Supreme Court, U.S.
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No. 00-1277

IN THE

Supreme Court of the United States

ILLINOIS STATE UNIVERSITY, *et al.*,

Petitioners,

v.

DR. IRIS I. VARNER, *et al.*,

Respondents,

-and-

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Whether Congress acted within its power under Section 5 of the Fourteenth Amendment when it abrogated the States' Eleventh Amendment immunity in the amendments to the Equal Pay Act, 29 U.S.C. § 206(d).

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Plaintiffs Dr. Iris I. Varner, Dr. Teresa M. Palmer and Dr. Paula J. Pomerenke, on their own behalf and on behalf of all other persons similarly situated, submit this Brief in Opposition to the Petition for a Writ of *Certiorari* to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

Respondents do not disagree with Petitioners' Statement of the Opinions below.

STATEMENT OF JURISDICTION

Respondents do not disagree with Petitioners' Statement of Jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

The Equal Pay Act, as amended by the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, provides in relevant part:

> "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 203(d).

The statute, as amended, further provides:

> "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 203(x).

The statute, as amended, further states in relevant part:

> . . . An action to recover the liability prescribed in either of the prescribed sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of themselves and other employees similarly situated. . . .

29 U.S.C. § 216(b).

STATEMENT OF THE CASE

A. Proceedings in the District Court

Respondents do not disagree with Petitioners' Statement of the Proceedings in the District Court.

B. Earlier Decision in the Circuit Court of Appeals

The earlier circuit court of appeals decision, *Varner v. Illinois St. Univ.*, 150 F.3d 706 (7th Cir. 1998), App., at 23a,[1] applying *Dellmuth v. Muth*, 491 U.S. 223 (1989), *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), in determining Congressional intent and *Seminole Tribe* and *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997), in ascertaining Congress' power to manifest its intent, affirmed the district court's decision that Congress properly exercised its legislative authority when it abrogated the States' Eleventh Amendment immunity in its amendment of the Equal Pay Act.

The circuit court cited Congress' definition of: "employer" to include "public agency," 29 U.S.C. § 203(d); "public agency" to include "the government of a State or political subdivision thereof; any agency of . . . a State, or a political subdivision of a State," 29 U.S.C. § 203(x); and, "employee" to include "any individual employed by a State, political subdivision of a State, or an interstate governmental agency." 29 U.S.C. § 203(e)(2)(C). The circuit court also cited the private enforcement provision of the statute that provides in relevant part that an action "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees." 29 U.S.C. § 216(b). The circuit court concluded that these explicit statements express the unmistakably clear intent of Congress to abrogate the Eleventh Amendment immunity of the States, and rejected Petitioners' argument that the statute does not contain explicit

1. Citations to Petitioners' Appendix to their Petition for Writ of *Certiorari* are set forth herein as App., at __.

references to the "Eleventh Amendment" or "abrogation of state sovereign immunity" because use of such "magic words" is not required by *Dellmuth*, *Atascadero* and *Seminole Tribe*. *Varner*, 150 F.3d at 710-711, App., at 31a.

Acknowledging that *Seminole Tribe* requires Congress to act pursuant to a constitutional provision granting it power to abrogate the States' sovereign immunity (*Varner*, 150 F.3d at 711, App., at 32a-33a), the circuit court further found that Congress in fact acted pursuant to its powers under Section 5 of the Fourteenth Amendment, under the standards and principles announced by this Court in *Boerne* when it applied the Equal Pay Act to the States. *Varner*, 150 F.3d at 717, App., at 48a.

The circuit court expressly recognized that although Congress cannot expand substantive rights contained in Section 1 of the Fourteenth Amendment, legislation that deters or remedies unconstitutional conduct is appropriate "even if in the process it prohibits conduct which is not itself unconstitutional."[2] *Varner*, 150 F.3d at 716, App., at 44a. Further,

> For an act to be appropriate remedial legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Boerne*, 521 U.S. at 520.

Varner, 150 F.3d at 716.

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2. *Boerne*, 521 U.S. at 518.

Responding to Petitioners' claimed lack of proportionality between the injury to be prevented and the means adopted to accomplish that end, the circuit court ruled that Congress enacted the Equal Pay Act because it found that pervasive discrimination existed whereby women were paid less than men for equal work. *Varner*, 150 F.3d at 716, App., at 46a, *citing Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). Such a finding, the circuit court noted, stood in contrast to the legislative record in *Boerne*. *Varner*, 150 F.3d at 716-717, App., at 46a.

After the circuit court announced its decision, Petitioners filed a request for rehearing and a suggestion for rehearing en banc; the request was denied on October 13, 1998. App., at 22a.

C. Prior Petition for Writ of *Certiorari* from this Court

On January 18, 2000, the Court granted Petitioners' prior petition for writ of *certiorari*, vacated the earlier decision of the circuit court of appeals, and remanded the case to the circuit court for further consideration in light of *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). App., at 21a.

In *Kimel*, the majority, explicitly drawing a distinction between age and gender discrimination, concluded that the amendment of the Age Discrimination in Employment Act ("ADEA") was an impermissible substantive re-definition of Fourteenth Amendment rights, and not a valid exercise of Congress' power. The minority concluded that Congress validly exercised its power to abrogate the States' immunity, regardless of whether the discrimination was based on age

or gender. All told, seven Justices agreed that Congress sufficiently expressed its intent to abrogate the States' immunity.[3]

D. Decision of the Circuit Court on Remand

On remand, the circuit court considered Petitioners' claim of Eleventh Amendment immunity in light of the Court's decision in *Kimel*, concluded that the district court had correctly rejected the Petitioners' claim of sovereign immunity, and affirmed the trial court's decision. *Varner v. Illinois St. Univ.*, 226 F.3d 927 (7th Cir. 2000); App., at 1a.

The circuit court noted that in *Kimel*, as in *Boerne*, the Court made it clear that "Congress' Section 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Varner*, 226 F.3d at 933, App., at 11a. In determining whether the Equal Pay Act is a proportional and congruent response to the problem of unconstitutional gender based wage discrimination, the circuit court first examined *Kimel*'s application of the congruence and proportionality test for age discrimination. *Varner*, 220 F.3d at 931, App., at 7a.

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3. Petitioners no longer dispute that Congressional intent to abrogate Eleventh Amendment immunity was expressed with requisite clarity when it extended the Equal Pay Act to the States in 1974. Irrespective of Petitioners' acknowledgment, Congress incorporated portions of the Equal Pay Act as the enforcement provision for ADEA, and used the same sections of the Fair Labor Standards Act to express its intent to abrogate sovereign immunity for purposes of the ADEA as it did for the Equal Pay Act. *Kimel*, 528 U.S. at 68-69. Therefore, under *Kimel*, there can be no question but that Congress sufficiently expressed its intent to exercise its abrogation powers with respect to the Equal Pay Act.

Kimel's majority conclusion: because age is not a suspect classification under the Equal Protection Clause, a State will not be deemed to offend the Fourteenth Amendment if it can demonstrate that the subject age classification is rationally related to its legitimate interest. As such, the ADEA "through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable [constitutional standard]." *Kimel*, 528 U.S. at 86. The circuit court also noted, *id.*, that the *Kimel* majority determined that there was little in the legislative record of ADEA to confirm that age discrimination by States was a widespread problem requiring a strong remedy. Thus, *Kimel* stands for the proposition that the ADEA's abrogation of Eleventh Amendment immunity was not a valid exercise of Congress' enforcement power under Section 5 of the Fourteenth Amendment. *Kimel*, 528 U.S. at 87-91.

The circuit court contrasted the "remedial regime" of the Equal Pay Act, with that of the ADEA and concluded that the former is "less indiscriminate in scope." *Varner*, 226 F.3d at 933, App., at 12a. Amplifying its conclusion, the circuit court says:

> In passing the Equal Pay Act, Congress did not prohibit all wage practices that result in a disparate impact upon the sexes, nor did it provide for liability upon a mere showing of unequal pay. Rather, an examination of the purpose of the Equal Pay Act, and an evaluation of its remedial scheme, demonstrate that the Act is targeted at the same kind of discrimination forbidden by the Constitution.

> In comparing the provisions of the ADEA disapproved in *Kimel*, and the remedial scheme of the Equal Pay Act, perhaps the most significant difference between the two statutes is in the exemptions from liability provided to employers once a *prima facie* case of discrimination has been made. In *Kimel*, the Supreme Court stated that, despite the narrowly-construed "bona fide occupational qualification" defense from liability under the ADEA, "the Act's substantive requirements nevertheless remain at a level akin to your heightened scrutiny cases under the Equal Protection Clause." *Kimel*, 120 S. Ct. at 648. In contrast, by providing a broad exemption from liability under the Equal Pay Act for any employer who can provide a neutral explanation for a disparity in pay, Congress has effectively targeted employers who intentionally discriminate against women. In other words, the broad exemption from liability in the Equal Pay Act for wage differentials based on "an other factor other than sex," 29 U.S.C. § 206(d) iv), indicates that the Act is intended to address the same kind of "purposeful [gender] discrimination" prohibited by the Constitution.

Varner, 220 F.3d at 934, App., at 12a-13a.

While recognizing that the legislative record of the Equal Pay Act does not contain explicit findings regarding gender discrimination by the States, the circuit court also noted that prior to the time that the Equal Pay Act was extended to the States:

> Congress had developed a clear understanding of the problem of gender discrimination on the part of the States. We believe that this evidence is sufficient to support the limited action taken by Congress in its passage of the Equal Pay Act, particularly given the well-documented history of gender discrimination in this Nation, a history that is embodied in the Supreme Court's own jurisprudence.

Varner, 220 F.3d at 935-36, App., at 17a.[4]

Petitioners filed a request for rehearing with the circuit court of appeals that was denied on November 8, 2000.

REASONS FOR DENYING THE WRIT

Summary

The petition for writ of *certiorari* fails to state any valid or compelling reason for granting *certiorari* as required by Supreme Court Rule 10. The Equal Pay Act is a valid exercise of Congress' Fourteenth Amendment enforcement power. Moreover, the court below correctly followed the Supreme Court's directives in *Kimel* and the instant decision is

4. Petitioners did not contest the adequacy of the legislative record outside the public sector.

consistent with the subsequent decision in *Board of Trustees of the University of Alabama v. Garrett*, 2001 U.S. LEXIS 1700 (February 21, 2001). Accordingly, the petition for a writ of *certiorari* should be denied.

I.

THE EQUAL PAY ACT IS A VALID EXERCISE OF CONGRESS' SECTION 5 ENFORCEMENT POWER.

The subject decision closely follows the analysis mandated by the Supreme Court for determining when legislation enacted pursuant to the Fourteenth Amendment is appropriate remedial legislation and thus abrogates State sovereign immunity. *See Garrett*, 2001 U.S. LEXIS 1700, at *14 (February 21, 2001); *Kimel*, 528 U.S. at 81; *Boerne*, 521 U.S. at 519-20; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Specifically, the Court has emphasized that while Congress may not rewrite the substantive meaning of the Constitution, Congress "is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment." *Kimel*, 528 U.S. at 81; *Garrett*, 2001 U.S. LEXIS 1700, at *55 (February 21, 2001); *Boerne*, 521 U.S. at 519-20. However, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 520.

The court below correctly determined that the limited Equal Pay Act remedy that prohibits only unexplained wage disparities is a "congruent and proportional" response to the evil of state sponsored gender based wage discrimination. *Varner*, 226 F.3d at 936, App., at 18a. Congress' goal in passing the Equal Pay Act was to prevent and remedy

intentional gender based wage discrimination. *See, e.g.*, S. Rep. No. 176, at 36, 39 (1963). The Act, accordingly, prohibits employers from paying men and women different wages for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d).

The "first step" in determining whether such a statute directed at states is "congruent and proportionate" to the targeted evil is to "identify with some precision the scope of the constitutional right at issue." *Garrett*, 2001 U.S. LEXIS 1700, at *17 (February 17, 2001). The Constitution prohibits states from discriminating against individuals on the basis of gender. Because of the long history of state sponsored discrimination against women, the Court has required states to provide an "exceedingly persuasive justification" to defend gender based classifications. *United States v. Virginia*, 518 U.S. 515, 533 (1996); *J.E.B. v. Alabama*, 511 U.S. 127, 136-37 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Specifically, a state is required to demonstrate that a gender based classification is "substantially related" to the achievement of "important governmental objectives." *Id.* Thus, in a challenge to a state gender based wage differential brought directly under the Constitution, the state would be required to demonstrate an exceedingly persuasive justification for the wage differential.

When applied under this constitutional framework, the Equal Pay Act is "congruent and proportional" to the targeted evil of wage discrimination. To establish a *prima facie* case under the Equal Pay Act, the employee must first demonstrate a wage disparity. The Equal Pay Act then shifts the burden to the state employer to establish one of four affirmative

defenses, including demonstrating that the wage disparity is the result of "any other factor other than sex." 29 U.S.C. § 206(d); *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974). In the case of a state employer, because states are prohibited by the Constitution from employing intentional gender classifications and because the employer can escape from liability by showing that the pay disparity is the result of "any other factor other than sex," the Equal Pay Act will encroach upon very few otherwise constitutional employment decisions. *Cf. Kimel*, 528 U.S. at 86 (disapproving of the ADEA because it "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard").

Nor does burden shifting — which is a component of the constitutional test for heightened scrutiny — convert the Equal Pay Act to a disparate impact statute. (Petition, at 11). The Supreme Court and lower courts have held that the Equal Pay Act addresses only facial wage discrimination or disparate treatment. *See County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981); *EEOC v. Parker*, 41 F.3d 1073, 1077 (7th Cir. 1994) (noting that the Equal Pay Act "preclude[s] disparate impact claims"). The constitutional standard may be "more demanding" and difficult for an employer to meet than an Equal Pay Act affirmative defense because, in a case brought under the Constitution, the employer must show that the factor other than sex is substantially related to a legitimate governmental objective. *See Varner*, 226 F.3d at 935,[5] App., at 15a.

5. In their attempt to argue that the Equal Pay Act prohibits a vast amount of constitutional conduct, Petitioners argue that in order to establish the "any other factor than sex" defense an employer (Cont'd)

The Equal Pay Act is thus readily distinguishable from the offending statutes in *Boerne*, *Kimel*, and *Garrett*, where Congress tried to "rewrite the Fourteenth Amendment law laid down by this Court." *Garrett*, 2001 U.S. LEXIS 1700, at *32 (February 21, 2001). For example, in the case of the Religious Freedom Restoration Act challenged in *Boerne*, Congress attempted a deliberate legislative "end-run" around the Court's holding in *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), and intended to codify the very constitutional standard rejected by the Court. *See Boerne*, 521 U.S. 512-16 (describing the history and intent of the RFRA). In the case of the Americans with Disabilities Act and the Age Discrimination in Employment Act challenged in *Garrett* and *Kimel*, respectively, Congress ignored prior holdings by the Court that applied rational basis review to state disability and age based classifications. *See, e.g., Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (holding that state classifications based on disability merit rational basis review); *Kimel*, 528 U.S. at 85 (describing the Court's equal

(Cont'd)
must "make a substantial showing of business necessity with respect to any practice that results in differential outcomes." (Petition, at 12). Petitioners have overstated the holdings in the three cases cited. At no point did the cases require a showing of necessity. Rather, they required a "legitimate business reason" for the other-than-sex factor in order to prevent the defense from becoming a loophole. *See, e.g., EEOC v. J.C. Penney, Co. Inc.*, 843 F.2d 249, 253 (6th Cir. 1988); *Kouba v. Hogan*, 691 F.2d 873, 876 (9th Cir. 1982). Further, this rule has not been adopted in every circuit. *See* Jeffrey K. Brown, *Crossing the Line: the Second, Sixth, Ninth and Eleventh Circuits' Misapplication of the Equal Pay Act's "Any Other Factor Other than Sex" Defense*, 13 Hofstra Lab. L.J. 181 (1995). In any event, the instant case does not present the issue argued by Petitioners, since the circuit court does not apply that standard.

protection jurisprudence concerning age discrimination). Instead, in both statutes, Congress attempted to subject states to liability for vastly more employment decisions than would be unconstitutional under the applicable rational basis standard. And, in each case, the Court determined that the supposed remedial legislation, when "[m]easured against the rational basis standard of our equal protection jurisprudence, . . . plainly imposes substantially higher burdens on state employers." *Kimel*, 528 U.S. at 87; *Garrett*, 2001 U.S. LEXIS 1700, at *29 (February 21, 2001) (noting that the accommodation duty in the Americans with Disabilities Act "far exceeds what is constitutionally required."). When judged "against the back-drop" of the Constitution and the Court's jurisprudence vis-à-vis *Kimel* (528 U.S. at 86), and compared with the statutes previously invalidated by the Court, the Equal Pay Act is a modest remedy designed to address the pervasive problem of gender based wage discrimination. In fact, if Congress is not permitted to enact such a limited statute to deter gender discrimination, it is unclear what Congress may do beyond "merely parrot[ing] the precise wording of the Fourteenth Amendment." *See Kimel*, 528 U.S. at 81.

Petitioners mistakenly argue that the "congruence and proportionality" test requires that Congress determine that no other remedy or forum was available to redress wage discrimination by states (Petition, at 18-19), as the meager citation for this proposition reveals. Petitioners' reliance on *Florida Prepaid Post Secondary Board v. College Savings Bank*, 527 U.S. 627 (1999) for this proposition is misplaced. *Florida Prepaid* involved legislation purportedly enacted to enforce the due process clause of the Fourteenth Amendment — not its equal protection clause. *Florida Prepaid* limited its discussion to property rights of patent holders. There, the Court examined adequacy of state

remedies, but only because the offending activity must deprive an individual of a property right or deny him procedural due process.

The instant case, unlike *Florida Prepaid*, presents issues that involve equal protection jurisprudence, with its varying levels of scrutiny, shifting burdens and presumptions of unconstitutionality. Moreover, under *Florida Prepaid*, inadequacy of State remedies is not a condition to Congress' power to abrogate Eleventh Amendment immunity, but instead is an element of the substantive constitutional violation, the States' denial of due process under Section 1 of the Fourteenth Amendment. As the Court stated:

> Thus, under the plain terms of the [Due Process] Clause and the clear import of our precedent, a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution. Instead, only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result.

119 S. Ct. at 2208. *Florida Prepaid* does not impose the inadequacy of State remedies as a condition to abrogation of Eleventh Amendment immunity. Since the Equal Pay Act redresses violations of the equal protection clause, the availability of other remedies is irrelevant.

II.

TO THE EXTENT THAT LEGISLATIVE FINDINGS ARE RELEVANT WHEN CONGRESS ENACTS A STATUTE THAT CLOSELY PARALLELS THE CONSTITUTIONAL PROHIBITION AGAINST GENDER DISCRIMINATION, THAT BURDEN IS MET HERE.

Because the Equal Pay Act prohibits few, if any, constitutional employment decisions by state employers, legislative findings are less relevant to a "congruence and proportionality" determination than when a statute pulls substantial constitutional activity into its purview. *Varner*, 226 F.3d at 935, App., at 16a ("the value of Congressional findings is greatly diminished by the fact that the Act prohibits very little constitutional conduct."); *accord Kovacevich v. Kent St. Univ.*, 224 F.3d 806, 820 n.6 (6th Cir. 2000); *Hundertmark v. Florida Dep't of Transportation*, 205 F.3d 1272, 1276 (11th Cir. 2000). Rather, the Court has stressed that legislative history is not determinative and is "only one means" to determine whether legislation is appropriate remedial legislation or in fact represents a substantive redefinition of states' legal obligations. *Kimel*, 528 U.S. 91; *Florida Prepaid*, 527 U.S. at 646; *Boerne*, 521 U.S. at 531. In *Boerne*, *Kimel* and *Garrett*, the Court first compared the conduct prohibited in the challenged statute to that already barred by the Constitution. In all three cases, the Court turned to the legislative findings only *after* making a determination that the challenged statute prohibited *substantial* constitutional activity by the states, by reason of which the prohibition was "out of proportion" to the "supposed remedial or preventative object" of the statute. *Boerne*, 521 U.S. at 532; *Kimel*, 528 U.S. at 87-89; *Garrett*, 2001 U.S. LEXIS 1700, at *22 (February 21, 2001).

In contrast, the Equal Pay Act targets intentional gender based wage discrimination by employers, and punishes almost no constitutional conduct by states. Moreover, challenges to gender discrimination by state actors are entitled to heightened review. *See, e.g., United States v. Virginia*, 518 U.S. at 531-32. Finally, unlike state employment decisions regarding age or disability that are valid unless irrational, decisions based on gender are presumptively invalid. Thus, when legislating to prevent gender discrimination, Congress is not required to make legislative findings that are as extensive as in the age and disability areas.

Lastly, even if Congress were to be required to demonstrate a pattern of state discrimination, that burden is met in the case of the Equal Pay Act. Although the legislative history of the Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, which extended the Equal Pay Act to the states in 1974, does not include extensive findings of state sponsored gender based wage discrimination, by the time of the hearings on the Amendments, Congress had already gathered substantial evidence of gender discrimination by state employers.[6] A few years earlier, in 1972, Congress extended the Equal Pay Act to educational institutions, Pub. L. No. 92-318, tit. IX, 86 Stat. 373-375 (1972); extended Title VII to state and local

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6. *See, e.g., Fair Labor Standards Amendments of 1971: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare*, Pt. 1, 92nd Cong., 1st Sess. 317 (1971) (statement of Dr. Ann Scott, NOW) (noting gender based pay discrimination in public schools); *id.* at 321-323 (statement of Dr. Bernice Sandler, Women's Equity Action League) (pointing out pervasiveness of unequal pay at universities and colleges with specific evidence of practices at state institutions).

employers, Pub. L. No. 92-261 § 2, 86 Stat. 103 (1972); and adopted the Equal Rights Amendment for state ratification, *see* S. Rep. No. 450, 93d Cong., 1st Sess. 4 (1973). In hearing after hearing and during the debates on these laws, Congress learned about the perniciousness of state sponsored gender based employment discrimination.[7]

Thus, Congress' amendment of the EPA in 1974 to permit female state employees to recover damages when they had been paid less than male employees performing the same work must not be considered in isolation. *See Florida Prepaid*, 527 U.S. at 639-40 (noting that Section 5 legislation should be viewed in a historical context). Rather, Congressional institutional knowledge of state gender discrimination should be viewed as part of an extended

7. *See, e.g., Economic Problems of Women: Hearings Before the Joint Economic Comm.*, 93rd Cong., 1st Sess. 105-6 (1973) (statement of William H. Brown, III, Chairman, EEOC) (discussing the "alarming" increase in discrimination claims, including claims of discriminatory pay, after Title VII extended to the states in 1972 and agreeing that state governments are among the worst offenders); S. Rep. No. 92-415, 92nd Cong., 1st Sess. (1971) (noting that women university professors are paid less than men); *Equal Rights for Men and Women 1971: Hearings Before Subcommittee No. 4 of the House Comm. on the Judiciary*, 92nd Cong., 1st Sess. 479-481, 486 (statement of Mary Dublin Keyserling) (noting that states are among the worst discriminators and stating "[w]e can not have an equal-pay law that leaves out some of the people who are most in need of equal pay."); *id.* at 268 (statement of Dr. Bernice Sandler, Women's Equity Action League) (detailing findings of numerous studies that document pay disparities between male and female professors at state universities); Senate Comm. on Labor and Pub. Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972*, at 1113 (reprint of Cong. Rec. Jan. 31, 1972) (statement of Sen. Williams) (noting "well-documented and widespread discrimination" by state employers); *id.* at 1175 (statement of Sen. Javitts) (same).

process during which Congress addressed the problem on several fronts, first by prohibiting such activity by employers generally in the Equal Pay Act in 1963 and Title VII of the Civil Rights Act of 1964, and then by specifically prohibiting discrimination by state employers.

By 1974, hearings that started from scratch would have been unrealistic and unnecessary. *See Economic Problems of Women: Hearings Before the Joint Economic Comm.*, 93rd Cong., 1st Sess. (1973); *see Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J. concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.") The Court has not required Congress to engage in repetitive hearings on a topic it has already discussed in order to pass legislation. *See, e.g., Oregon v. Mitchell*, 400 U.S. 112, 284 (Stewart, J., concurring in part, dissenting in part) (1976) (noting that when it created a nationwide literacy test ban, Congress "was not required to make state-by-state findings . . ." because that "[e]xperience gained under the 1965 Act has now led Congress to conclude that it should go the whole distance."). Thus, contrary to Petitioners' view of the adequacy of the legislative record, by 1974 Congress had sufficiently documented the problem of employment discrimination by state employers. The legislative process should not be required to include a tally of which members of Congress acquired what knowledge and when to satisfy a legislative findings requirement.

CONCLUSION

On the basis of the foregoing, Respondents request that the Petition for a Writ of *Certiorari* be denied.

Respectfully submitted,

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